

WORKPLACE BULLYING STATUTES AND THE POTENTIAL EFFECT ON SMALL BUSINESS

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*"Before it happened to me, I used to think that employees who were given a hard time by their bosses probably deserved it. As long as I worked hard and took pride in my work, I had nothing to worry about. I was wrong. I became a target shortly after a co-worker made a false allegation against me. My manager began a campaign to drive me out of the workplace by replacing my duties with menial tasks, denying time off, refusing to speak to me except to reprimand; writing me up for minor and contrived infractions, sabotaging my work, enlisting others to monitor and criticize my work, and physically intimidating me. I am still hanging on after several months because I cannot afford to quit and job prospects are slim in this economy. No one in a civilized society should have to endure such mistreatment to earn a living."*¹

I. INTRODUCTION

Workplace bullying is an issue that has received significant attention in recent years. The Workplace Bullying Institute² defines workplace bullying as the repeated, health-harming mistreatment of one or more persons, which takes one or more of the following forms: verbal abuse, offensive conduct or threatening behavior, humiliation or intimidation or work interference that prevents work from getting done.³ Existing legal remedies are

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¹ This is Krystal's story, posted along with other personal stories of workplace bullying on the California Healthy Workplace Advocates. See *Stop Workplace Bullying*, <http://www.bullyfreeworkplace.org> (last visited Mar. 30, 2012).

² The Workplace Bullying Institute is an organization dedicated to the eradication of workplace bullying that combines help for individuals, research, books, public education, training for professionals and legislative advocacy. *Workplace Bullying Institute*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/> (last visited Mar. 30, 2012). Dr. Gary Namie founded the Workplace Bullying Institute fourteen years ago with his wife, Ruth, after she fell prey to on-the-job bullying. *History of the Workplace Bullying Institute*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/history-of-wbi/> (last visited Mar. 30, 2012).

³ *Definition of Workplace Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/definition/> (last visited Mar. 30, 2012).

insufficient to deal with the issue of workplace bullying. Tort remedies, such as intentional infliction of emotional distress ("IIED") and intentional interference in the employment relationship ("IIER"), provide some protection, but only in the most extreme circumstances.⁴ Additionally, state and federal discrimination statutes provide some relief when the employee is bullied because of his or her membership in a protected class.⁵ But, again, this remedy applies only in a limited number of situations.⁶ Statutes providing for a cause of action against "workplace bullies" have been introduced in several state legislatures around the country. These statutes are beginning to garner some support. The introduction and support of these workplace bullying statutes are populist ideas that are encouraging for workers who are fed up with, and without sufficient legal recourse against, their abusive bosses.

The piece of legislation that has garnered the most support is the bill currently in front of the New York State Legislature.⁷ Proponents of the bill believe that if this bill manages to pass both the New York Assembly and the New York Senate and is signed into law by Governor Andrew Cuomo, there will be a snowball effect resulting in state legislatures throughout the country passing similar legislation.⁸ One of these proponents is Dr. Gary Namie, founder of the Workplace Bullying Institute.⁹ He believes that because of New York's bellwether status, if New York passes workplace bullying protections then other states will soon follow suit.¹⁰

Opponents of this legislative movement contend that these statutes will have devastating effects on small businesses around the country that undoubtedly employ some of these bullying bosses.¹¹ However, workplace bullying is an issue that currently has dramatic effects on the bottom-line of businesses all over the country. Studies have shown that workplace bullying

⁴ See *infra* Part III.

⁵ See *infra* Part III.D.

⁶ See *Frequently Asked Questions about the Healthy Workplace Bill*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/faq.php> (last visited Mar. 30, 2012) [hereinafter *Frequently Asked Questions*].

⁷ As of January 22, 2012, S. 4289 and A. 4258 had been introduced but not passed in the New York Senate and Assembly, respectively. *New York—Legislation Status & News*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/ny/newyork.php> (last visited Mar. 30, 2012) [hereinafter *New York*].

⁸ Sarah E. Needleman, *For Businesses, Bully Lawsuits May Pose New Threat*, WALL ST. J. (May 26, 2010), <http://online.wsj.com/article/SB10001424052748704717004575268701579722946.html>.

⁹ *Who We Are*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/the-drs-namie/> (last visited Mar. 30, 2012) (Dr. Gary Namie is a social psychologist and widely regarded as the foremost authority on workplace bullying in North America).

¹⁰ Tina Susman, *State Bills Against Workplace Bullying Gain Traction*, L.A. TIMES (Mar. 18, 2011), <http://articles.latimes.com/2011/mar/18/nation/la-na-workplace-bullying-20110319>.

¹¹ See *infra* Part V (discussing other opponents contend that this is not the appropriate economic climate for this type of regulation.).

can cost anywhere from \$30,000 to \$100,000 per year for each individual that is bullied.¹²

These workplace bullying initiatives follow a wave of anti-bullying sentiment that has swept the country. States nationwide have begun adopting protections against schoolyard bullying and cyberbullying.¹³ Schoolyard bullying and workplace bullying are similar and both deserve attention from our legislators. Both types of bullying involve the desperate grab for control by an insecure or inadequate person, and both employ humiliation as a means of exercising this power.¹⁴ Americans have become familiar with the accounts of teens who have tragically taken their own lives as a result of bullying by their peers.¹⁵ Workplace bullying has similarly resulted in such tragedies. For instance, Kevin Morrissey, managing editor of the Virginia Quarterly Review, committed suicide on July 30, 2010.¹⁶ Co-workers said that they had heard Kevin's boss yelling at him from behind closed doors.¹⁷ Before his suicide, the boss had recently banished Kevin and a co-worker from the office for a week after an argument.¹⁸ Kevin's co-workers and family are convinced that his suicide was a result of alleged bullying by his boss.¹⁹ This tragic story and others like it have become the rallying point for supporters of the Healthy Workplace Bill in New York.²⁰ It is important to remember that bottom line figures alone cannot tell the story of workplace bullying in America. It is stories like Kevin's that demonstrate the severity of this epidemic and the necessity for meaningful and lasting changes to the way workplace bullying is addressed in our legal system.

¹² TERESA A. DANIEL, STOP BULLYING AT WORK: STRATEGIES AND TOOLS FOR HR AND LEGAL PROFESSIONALS 41 (2009).

¹³ See Jim Siegel, *Senate Panel OKs Bill to Curb Bullying*, COLUMBUS DISPATCH, (Jan. 11, 2012), <http://www.dispatch.com/content/stories/local/2012/01/11/panel-oks-bill-to-curb-bullying.html>.

¹⁴ *Bullying Contrasted with Other Phenomena*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/bullying-contrasted/> (last visited Mar. 30, 2012).

¹⁵ See Siegel, *supra* note 13 ("[Ohio] House Bill 116 is now called the Jessica Logan Act, named for [an 18-year-old Ohio teen] that committed suicide . . . after a nude photo [of her] meant for her boyfriend was forwarded to hundreds of students . . .").

¹⁶ Ray Sanchez, *Did Depression or a Bully Boss Prompt Editor's Suicide*, ABC NEWS (Aug. 19, 2010), <http://www.abcnews.go.com/Business/MindMoodResourceCenter/editors-suicide-draws-attention-workplace-bullying/story?id=11421810#.TxGysW-JeSo>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Healthy Workplace Bill: New York*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/ny/newyork.php#pressconference> (last visited Mar. 30, 2012).

II. WHAT IS WORKPLACE BULLYING?

Workplace bullying has been defined as the deliberate, hurtful and repeated mistreatment of a target that is driven by the bully's desire to control.²¹ The International Labour Organization ("ILO")²² has defined workplace bullying as offensive behavior through vindictive, malicious or humiliating attempts to undermine an individual or group of employees.²³ Finally, the current anti-bullying legislation in the New York legislature, Senate Bill 4289, defines abusive conduct as conduct with malice, taken against an employee by another employee in the workplace, which a reasonable person would find to be hostile, offensive and unrelated to the employer's legitimate business interests.²⁴

Workplace bullying, as defined above, can include many different behaviors in the workplace.²⁵ Some non-verbal means of bullying include the following: aggressive eye contact, either by glaring or meaningful glances; giving someone the silent treatment; intimidating physical gestures, including finger pointing; and slamming or throwing objects.²⁶ Examples of verbal bullying in the workplace include yelling, screaming and/or cursing at the target, angry outbursts or temper tantrums, nasty, rude and hostile behavior toward the target, accusations of wrongdoing, insulting or belittling the target, often in front of other workers and excessive or harsh criticism of the target's work performance.²⁷ Additional forms of workplace bullying also include false rumors about the target, breaching the

²¹ GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* 17 (1999).

²² The International Labour Organization is a United Nations agency that is responsible for drawing up and overseeing international labor standards. *About the ILO*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Mar. 30, 2012).

²³ DUNCAN CHAPPELL & VITTORIO DI MARTINO, *VIOLENCE AT WORK* 11 (1st ed. 1998).

²⁴ *S4289*□2011: *Establishes a Civil Cause of Action for Employees Who Are Subjected to an Abusive Work Environment*, NYSENATE.GOV, <http://open.nysenate.gov/legislation/bill/S4289-2011> (last visited Mar. 30, 2012) [hereinafter NYSENATE.GOV].

²⁵ DANIEL, *supra* note 12, at 9–10. A 2007 U.S. Workplace Bullying Survey, conducted by the Workplace Bullying Institute and Zogby International researchers, found that negative acts of a workplace bully most typically included the following (with the percentage of respondents reporting the conduct): verbal abuse (53%); behaviors/actions (53%); abuse of authority (47%); interference with work performance (45%); destruction of workplace relationships (30%). *Id.*

²⁶ David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 481–82 (2000) (citing Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and Empirical Issues*, 1 J. EMOTIONAL ABUSE 85, 97–98 (1998)) [hereinafter *The Phenomenon of "Workplace Bullying"*].

²⁷ *Id.*

target's confidentiality, making unreasonable work demands, withholding needed information and taking credit for the target's work.²⁸

Not only does workplace bullying include a multitude of workplace activities, but it is quite pervasive throughout American workplaces. According to a 2010 Zogby International poll, 35% of workers have experienced workplace bullying firsthand, and another 15% have witnessed such bullying.²⁹ Thus, according to the Zogby International poll, half of all American workers have had immediate exposure to workplace bullying.³⁰ According to the recent New York legislation, recent surveys and studies have documented that between 16% and 21% of employees directly experience health-endangering workplace bullying, abuse and harassment.³¹ Workplace bullying is four-times more prevalent than illegal harassment.³²

A. Causes and Effects of Workplace Bullying

David Yamada, a scholar in this area, says that workplace bullying results from the combination of multiple factors: growth of the service sector economy, global profit squeeze, decline of unionization, diversification of the workforce and increased reliance on contingent workers.³³ Service sector jobs accounted for over 70% of jobs in the United States in 1990, while jobs in the manufacturing sector had dropped to around 25% and jobs in agriculture had dropped to around 3% of the available jobs in the country.³⁴ Service sector jobs create a prime atmosphere for workplace bullying because the jobs are so dependent on personal interaction, and the psychological aspects of work can be exacerbated.³⁵ When people have to interact constantly with their co-workers, there is an increased possibility that their personalities will clash and workplace bullying may ensue.³⁶

The globalization of the economy has also contributed to workplace bullying by creating more stressful work environments in companies whose

²⁸ *Id.* at 482.

²⁹ *Results of the 2010 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/wbiresearch/2010-wbi-national-survey/> (last visited Mar. 30, 2012) [hereinafter *2010 Survey*].

³⁰ DANIEL, *supra* note 12, at 20–21 (reporting the following results of a 2007 U.S. Workplace Bullying Survey: 57% of those employees targeted for bullying are female; female bullies target other females in 71% of reported cases; 55% of targets were “rank-and-file” employees; 45% suffer stress-related health problems; 40% never complain or report the abuse; 24% of the targets were terminated; 40% voluntarily left the organization; 4% complain to state or federal agencies; and only 3% file a lawsuit).

³¹ NYSENATE.GOV, *supra* note 24.

³² *2010 Survey*, *supra* note 29.

³³ *The Phenomenon of “Workplace Bullying”*, *supra* note 26, at 486–91.

³⁴ *Id.* at 486.

³⁵ *Id.*

³⁶ *Id.* at 487.

singular focus is cutting costs while providing superior goods and services.³⁷ Because of the profit squeeze and the threat of cheaper goods and lower costs from abroad, companies have reduced the number of managers and have an expectation that the remaining managers “produce more with fewer resources.”³⁸ This added stress adds to the potential for workplace bullying.

In 1995, only 16.7% of nonagricultural workers were members of unions, down from 35.5% in 1945.³⁹ A union could provide many protections against workplace bullying that are currently absent. Collective bargaining would give employees more of an opportunity to negotiate for better working conditions and would give employees greater protection from negative employment actions.⁴⁰ Additionally, unions give employees a venue for resolving disputes with abusive co-workers.⁴¹ Non-union employees do not have these same avenues to help resolve disputes with abusive co-workers. Employers have virtually unchecked power over non-unionized employees.⁴² Union representation, however, may not be a cure-all to the problem of workplace bullying, as a Workplace Bullying Institute study suggests.⁴³ In this study, about a quarter of the employees sampled did not trust their unions to handle workplace bullying any more than they trust their employers.⁴⁴ The study attempts to explain this counterintuitive finding. In most cases, unions could be effective if the bullying was done by a non-member.⁴⁵ But, if there is member-on-member bullying, the union may be compelled to defend both the bully and the target and be unable to stop the bullying behavior.⁴⁶ As evidenced by this study, an increase in union membership may not even combat workplace bullying.⁴⁷

The diversification of the workforce has also helped prime the modern workplace for bullying. Increased diversity is one of the factors that is significantly related to bullying.⁴⁸ People tend to be attracted to people that they perceive as similar to themselves and repulsed by people they perceive

³⁷ *Id.*

³⁸ *Id.* at 488 (quoting HARVEY A. HORNSTEIN, *BRUTAL BOSSES AND THEIR PREY* 26 (1996)).

³⁹ *The Phenomenon of “Workplace Bullying”*, *supra* note 26, at 488 (citing MICHAEL C. HARPER & SAMUEL ESTREICHER, *LABOR LAW* 111 (4th ed. 1996)).

⁴⁰ *Id.* at 488–89.

⁴¹ *Id.* at 489.

⁴² *Unions and Workplace Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/2011/01/30/union-instant-poll/> (last visited Mar. 30, 2012).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *The Phenomenon of “Workplace Bullying”*, *supra* note 26, at 490 (quoting Robert A. Baron & Joel H. Neuman, *Workplace Violence and Workplace Aggression: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, 24 J. MGMT. 391, 403 (1998)).

as different.⁴⁹ When an employment environment consists of people with diverse characteristics, there are decreased levels of interpersonal attraction and an increased potential for aggression, and this could result in bullying if these relationships are not properly managed.⁵⁰

The increase in workplace bullying has also resulted from the increased reliance on contingent workers. There has been an increased reliance on part-time work, temporary help agencies, in-house temporary labor pools, independent contractors and other forms of flexible labor.⁵¹ David Yamada asserts that the rise of the contingent workforce creates an atmosphere that encourages workplace bullying.⁵² These types of temporary employment relationships do not encourage the creation of positive interpersonal bonds.⁵³ In these temporary relationships, workers are depersonalized and thought to be disposable.⁵⁴ All of these factors show that the current environment within the American workplace has made it very susceptible to cases of workplace bullying. These factors, combined with the aforementioned pervasiveness of workplace bullying, demonstrate that workplace bullying is an epidemic in the American workplace.

Workplace bullying can have serious physical and psychological effects on the bullying targets. Some common physical issues resulting from workplace bullying include stress headaches, high blood pressure, impaired immune systems and digestive problems.⁵⁵ Common psychological effects can include stress, mood swings, depression, loss of sleep (and resulting fatigue) and feelings of shame, embarrassment, guilt and low self-esteem.⁵⁶

Not only does workplace bullying have a direct effect on the victim's body and mind, but it can also directly impact society. As will be discussed further below, workplace bullying can have serious bottom-line consequences for the economy at large.⁵⁷ These bottom-line consequences include both direct and indirect costs. A recent survey found that workplace bullying has resulted in a cost of more than \$180 million in lost time and

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 491.

⁵³ *Id.*

⁵⁴ *The Phenomenon of "Workplace Bullying", supra* note 26, at 491.

⁵⁵ David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 480 (2004) (citing GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* 56, 60 (2003)) [hereinafter *Crafting a Legislative Response*].

⁵⁶ *Id.* at 480 (citing NAMIE & NAMIE, *supra* note 55, at 55 and Karen Jagantic & Loreleigh Keashley, *By Any Other Name: American Perspectives on Workplace Bullying*, in BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 52-57 (Stale Einarsen et al. eds., 2003)).

⁵⁷ *Crafting a Legislative Response, supra* note 55, at 481 (quoting EMILY S. BASSMAN, *ABUSE IN THE WORKPLACE: MANAGEMENT REMEDIES AND BOTTOM LINE IMPACT* 137-49 (1992)).

productivity.⁵⁸ Workplace bullying has a profound effect on employees' physical and psychological health, and on the productivity of these workers in our economy.

B. *The Costs of Workplace Bullying*

Emily Bassman has studied the negative effects of workplace bullying on the bottom-lines of businesses and has concluded that "employee abuse can have major bottom-line consequences' for employers including direct costs, indirect costs and opportunity costs."⁵⁹ The direct costs of workplace bullying include increased medical costs from stress-related health problems.⁶⁰ Employees seek medical attention for their stress-related problems and this can result in disability pay or a worker's compensation claim.⁶¹ The indirect costs include quality of work, high turnover of employees, absenteeism, poor customer relationships, sabotage and revenge as a result of the abusive relationship.⁶² Opportunity costs include lack of effort, commitments outside of the job, time spent talking about the problem and loss of creativity.⁶³

Targets of bullying take an average of seven additional days of sick leave per year than those who were not targets of bullying⁶⁴ and forty-six percent of all targets indicated that they were thinking about leaving their position.⁶⁵ It is reported that bullying can cost an organization approximately \$30,000 to \$100,000 per year for each individual that is subjected to bullying.⁶⁶

Polly Wright of HR Consults stated, "I really think [bullying] takes a toll on morale, to the point where employees are so disengaged in their work environment that they are going through the motions."⁶⁷ High absenteeism and turnover are often the result of workplace bullying and

⁵⁸ Liz Urbanski Farrell, *Workplace Bullying's High Cost: \$180 Million in Lost Time, Productivity*, ORLANDO BUS. J. (Mar. 18, 2002, 12:00 AM), <http://www.bizjournals.com/orlando/stories/2002/03/18/focus1.html?page=all>.

⁵⁹ *Crafting a Legislative Response*, *supra* note 55, at 481.

⁶⁰ BASSMAN, *supra* note 57, at 138-40.

⁶¹ *Id.*

⁶² *Id.* at 141-44.

⁶³ *Id.* at 144-50.

⁶⁴ DANIEL, *supra* note 12, at 41 (citing H. HOEL & C.L. COOPER, *DESTRUCTIVE CONFLICT AND BULLYING AT WORK* (2000)).

⁶⁵ DANIEL, *supra* note 12, at 41 (internal citations omitted).

⁶⁶ *Id.* (citing H. LEYMAN, *MORAL HARASSMENT AND PSYCHOLOGICAL TERROR AT WORKPLACES* 119-26 (1990)).

⁶⁷ Kate Rogers, *How to Handle the Workplace Bully*, FOXBUSINESS (July 7, 2011), <http://smallbusiness.foxbusiness.com/legal-hr/2011/07/07/how-to-handle-workplace-bully/>.

lead to an increase in these costs.⁶⁸ Other costs of bullying for businesses include high staff turnover, retraining costs, damage to employee health, absenteeism and sick leave, workplace violence, wrongful termination suits and lowered productivity.⁶⁹ “The American Psychological Association (“APA”) estimates that American companies lose approximately \$300 billion per year as a result of the loss of productivity, absenteeism, turnover, and increased medical costs due to increased stress at work caused by bullying and other abuse.”⁷⁰ “The mental impact of bullying among the workforce reportedly leads to a loss in employment totaling \$19 billion, and a drop in productivity of \$3 billion.”⁷¹ According to a report by the World Health Organization (“WHO”) and the ILO, “the drop in productivity caused by stress related to bullying results in \$80 billion in lost revenues per year.”⁷² As evidenced by the aforementioned facts, workplace bullying is a costly problem faced by small businesses.

III. CURRENT REMEDIES AVAILABLE TO THOSE BULLIED IN THE WORKPLACE

The American legal system is currently unable to adequately resolve the issue of workplace bullying. Existing legal doctrines such as IIED, IIER and statutory schemes do not adequately prevent workplace bullying or compensate targets of bullying who suffer emotional, physical and/or economic damage at the hands of a bully.⁷³ Current remedies including tort actions such as IIED and IIER, discrimination statutes and other common law remedies are insufficient to address and solve the issue of workplace bullying.⁷⁴

A. *Intentional Infliction of Emotional Distress*

The Second Restatement of Torts defines Intentional Infliction of Emotional Distress (IIED) as extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress to another.⁷⁵ A person liable for IIED will be liable for the emotional distress or physical harm caused by his actions.⁷⁶ Claims for IIED are rarely successful.⁷⁷ The

⁶⁸ Carol Rick Gibbons, Rodney A. Satterwhite & Latoya C. Asia, *Don't Get Pushed Around: What Employers Should Do to Address Bullying Behavior in the Workplace*, 87 ACC DOCKET 84, 87 (2010).

⁶⁹ *Id.* at 91.

⁷⁰ DANIEL, *supra* note 12, at 42 (citing SCRIPPS HOWARD NEWS SERVICE (2007)).

⁷¹ *Id.* at 41 (internal citations omitted).

⁷² *Id.* (internal citations omitted).

⁷³ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 479.

⁷⁴ *Id.*

⁷⁵ RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

⁷⁶ *Id.*

⁷⁷ See *Holloman v. Keadle*, 931 S.W.2d 413 (Ark. 1996). A male doctor allegedly repeatedly cursed at the female plaintiff, referred to her as a “slut,” “whore” and

primary reason for the lack of success of IIED claims is that the standard for "extreme and outrageous conduct" is very high.⁷⁸ The comments to the Second Restatement of Torts explain that liability will only be found "where the conduct has been so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."⁷⁹ As is evident by the above comment, the bar is set very high for what will be considered extreme and outrageous conduct.

Many issues have arisen in litigation in regards to the standard for extreme and outrageous conduct, leaving employers and employees uncertain of what behavior is protected or when a remedy is available to them. Courts disagree primarily on whether conduct is "outrageous" or only "highly offensive."⁸⁰

An example of the high bar set for relief is in *Island v. Buena Vista Resort*.⁸¹ In this case, the plaintiff alleged that during her employment, her boss approached her and propositioned her for sex.⁸² The plaintiff alleged that her boss also made lewd comments to her, and when she denied his sexual advances, she was treated poorly and eventually terminated.⁸³ The court found that the employer's sexual advances were not sufficiently outrageous because, while it was clear that the allegations of behavior were egregious, it appeared that appellant had failed to offer proof that she suffered damages or emotional distress so severe that no reasonable person

"white nigger." *Id.* The doctor told her that he had connections with the mob and that he carried a gun in order to intimidate her. *Id.* The court found that in order for a claim to be established, the doctor had to know that she was not a person of ordinary temperament or know that she was especially susceptible to emotional distress. *Id.* See also *Turnball v. Northside Hosp., Inc.*, 470 S.E.2d 464 (Ga. Ct. App. 1996) (finding that alleged conduct of glaring with contempt and anger, slamming doors and snatching phone messages from plaintiff's hand was childish and rude but not extreme and outrageous conduct); *Mirzaie v. Smith Cogeneration, Inc.*, 962 P.2d 678 (Okla. Civ. App. 1998) (various insulting and degrading actions by supervisor insufficient to support IIED claim); *Denton v. Chittenden Bank*, 655 A.2d 703 (Vt. 1994) (holding that individual incidents were insignificant and should not be aggregated to find that the behavior was extreme and outrageous). But see *Vasarhelyi v. New Sch. for Soc. Research*, 646 N.Y.S.2d 795 (N.Y. App. Div. 1996) (reinstating an IIED claim alleging that the plaintiff was subjected to ten hours of intense interrogation, humiliation for her use of English and questioning about her relationships, honesty and chastity).

⁷⁸ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 494.

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

⁸⁰ RESTATEMENT (THIRD) OF TORTS § 46 cmt. c (2005). Whether conduct is considered extreme and outrageous depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor and whether the conduct was repeated or prolonged. *Id.*

⁸¹ *Island v. Buena Vista Resort*, 103 S.W.3d 671 (Ark. 2003).

⁸² *Id.* at 673.

⁸³ *Id.*

could be expected to endure it.⁸⁴ The only emotional distress that plaintiff alleged was that she was depressed as a result of the defendant's sexual advances.⁸⁵ The court found that this was not enough to constitute severe emotional distress.⁸⁶

Another example of the difficulty of successfully suing on the tort theory of IIED is found in *Crowley v. North American Telecommunications Association*.⁸⁷ It was alleged that Crowley's boss thwarted Crowley's efforts within the office, refused to meet with him or include him in board meetings, ignored his presence and treated him in a hostile and unprofessional manner.⁸⁸ Crowley was given a poor performance evaluation, which he refused to sign, and was consequently terminated.⁸⁹ Additionally, Crowley's boss told his employees and former co-workers that an empty bullet casing had been found in the hallway and was probably left by Crowley.⁹⁰ This statement caused injury to Crowley's business and personal reputation.⁹¹ The court found that while the conduct was offensive and unfair, such conduct was not in itself of the type actionable on this tort theory.⁹²

The limited circumstances under which an IIED claim leads to relief for those bullied at work have led some scholars, legislators and other advocates to believe that workplace bullying legislation is necessary. The limitation of this tort leaves those that suffer from serious emotional and psychological abuse that does not rise to the level of "extreme and outrageous" without recourse under the law.⁹³

B. *Intentional Interference in the Employment Relationship*

Another possible, albeit unlikely, remedy for victims of workplace bullying is Intentional Interference in the Employment Relationship (IIER). The Draft Restatement of Employment Law states that an employer may be subject to liability for any reasonably foreseeable pecuniary loss suffered by an employee or former employee because the employer intentionally and without a legitimate business justification causes another employer not to

⁸⁴ *Id.* at 681.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Crowley v. N. Am. Telecomm. Ass'n*, 691 A.2d 1169 (D.C. 1997).

⁸⁸ *Id.* at 1171.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1172 (citing *Waldon v. Covington*, 415 A.2d 1070, 1076 (D.C. 1980) (stating liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities")).

⁹³ See TIMOTHY GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 276 (2d ed. 2011).

enter into or discontinue an employment relationship with the employee or former employee.⁹⁴

This tort applies to workplace bullying in a very limited sense. The contractual relationship between the employer and employee is considered to be interfered with by the supervisor; the question then becomes whether a third party has unjustifiably interfered with that relationship.⁹⁵ In this context, the question is whether or not a supervisor can be considered a third party. One view is that the supervisor is not a third party since the supervisor has an absolute privilege to interfere with the employment relationship.⁹⁶ Generally, in order to be considered a third party, a supervisor must act outside the scope of his employment relationship by bullying the employee.⁹⁷

Courts are split on the issue of whether a bullying employee is acting outside the scope of his or her employment. For instance, the Massachusetts Supreme Judicial Court has found that a supervisor can be held liable for this tort by engaging in a course of abusive, bullying conduct towards the plaintiff that was not related to the company's interests.⁹⁸ Other courts have held that conduct that is not for the benefit of the company may be conclusive in showing that the supervisor acted outside of the scope of his or her authority.⁹⁹ In Oregon, however, the Court of Appeals found that an employer could not be held liable for interference with an employment relationship to which he was a party.¹⁰⁰ Because of the unlikelihood that a supervisor will be considered a third party for the purposes of this tort, intentional interference with the employment relationship has limited application to the issue of workplace bullying. Therefore, IIER, as is the case with IIED, does not provide a significant remedy for the issue of workplace bullying.

⁹⁴ RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 6.03(a) (Tentative Draft No. 4 2011).

⁹⁵ GLYNN ET AL., *supra* note 93, at 245.

⁹⁶ *Id.* at 246. *See, e.g.,* Halvorsen v. Aramark Unif. Servs., Inc., 77 Cal. Rptr. 2d 383, 390 (Cal. Ct. App. 1998).

⁹⁷ *Crafting a Legislative Response*, *supra* note 55, at 489.

⁹⁸ O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d 843 (Mass. 1996).

⁹⁹ *See* Reed v. Mich. Metro Girl Scout Council, 506 N.W.2d 231, 233 (Mich. Ct. App. 1993); Huff v. Swartz, 606 N.W.2d 461, 467 (Neb. 2000) (stating that a supervisor will only be liable when his actions are only intended to further some individual or private purpose not related to the interests of the employer); Kaelon v. USF Reddaway, Inc., 42 P.3d 344 (Or. Ct. App. 2002) (stating that if the agent's sole purpose is not for the benefit of the corporation the agent is not acting within the scope of the authority and may be liable).

¹⁰⁰ Lewis v. Oregon Beauty Supply Co., 714 P.2d 618, 622 (Or. Ct. App. 1986).

C. Occupational Safety and Health Act (OSHA)

The Occupational Safety and Health Act ("OSHA") was signed into law in 1970, with the purpose of assuring "every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."¹⁰¹ Congress found that injuries in the workplace cost the American economic system in the form of lost production, wage loss, medical expenses and disability compensation payments.¹⁰² Although these effects on the economic system are similar to the effects that workplace bullying has on the American economic system, OSHA was designed to deal with the physical hazards in the workplace and, more specifically, in the industrial sector.¹⁰³ Because Congress did not intend for OSHA to apply to issues of workplace bullying, courts have not applied it. Additionally, OSHA does not provide for a private right of action so victims would have to rely on the agency to directly protect them in the workplace.¹⁰⁴ These factors, combined with the ineffective penalties¹⁰⁵ that result from violating OSHA and an underfunded enforcement agency,¹⁰⁶ make OSHA an unlikely source of protections for bullied employees.

D. Illegal Discrimination Statutes

Federal and state discrimination statutes can also provide some relief for the targets of workplace bullying, but these protections do not apply to a large percentage of bullied victims. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against members of a protected class.¹⁰⁷ The hostile work environment doctrine has been developed by courts to deal with the issue of workers facing hostility based on their membership in a protected class.¹⁰⁸ In determining whether a hostile work environment exists, courts look at the severity of the discriminatory conduct, whether the conduct was physically threatening, humiliating, or merely an offensive utterance and whether the conduct unreasonably interferes with an employee's performance.¹⁰⁹ Other state and federal discrimination statutes also require that the person be a member of a certain

¹⁰¹ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 521 (quoting Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (1994)).

¹⁰² *The Phenomenon of "Workplace Bullying"*, *supra* note 26.

¹⁰³ *Id.* at 521–22.

¹⁰⁴ *Id.* at 522.

¹⁰⁵ GLYNN ET AL., *supra* note 93, at 859.

¹⁰⁶ *Id.* at 861.

¹⁰⁷ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 509. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (including race, color, national origin, religion and sex as protected classes).

¹⁰⁸ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 509.

¹⁰⁹ *Id.* at 510 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

protected class.¹¹⁰ Additionally, some adverse action must have been taken based on that membership in the protected class. Therefore, those that are bullied because of their membership in a protected class may find relief under these illegal discrimination statutes. However, protection under federal and state discrimination laws is inadequate for those who are not bullied because of membership in a protected class. Federal and state anti-discrimination laws are only implicated in 20% of the workplace bullying cases,¹¹¹ leaving approximately 80% of bullying targets without sufficient recourse.

E. Common Law Recognition of Workplace Bullying

The first and only case to recognize and explicitly refer to workplace bullying was decided by the Indiana Supreme Court in 2008. The Indiana Supreme Court recognized the existence of workplace bullying in its opinion in *Raess v. Doescher*.¹¹² In this case, the plaintiff worked for a cardiovascular surgeon in a hospital operating room. Plaintiff alleged that Mr. Raess aggressively charged him with clenched fists, piercing eyes, a beet-red face and popping veins while screaming and swearing at him.¹¹³ After this incident, Mr. Doescher suffered from depression and anxiety; he developed sleep problems, experienced a loss of appetite and confidence and did not return to the hospital.¹¹⁴

Mr. Doescher brought suit against the surgeon claiming IIED and tortious assault.¹¹⁵ As part of his trial strategy, Mr. Doescher attempted to introduce the testimony of a workplace bullying expert, Dr. Gary Namie.¹¹⁶ The testimony was allowed and Dr. Namie testified that Mr. Raess was a workplace bully. The jury found for the plaintiff on his assault claim and awarded him damages of \$325,000.¹¹⁷ On appeal, the jury verdict was overturned because the trial court refused to give a jury instruction explaining that workplace bullying was not relevant to the case.¹¹⁸

¹¹⁰ Some federal statutes protect from discrimination based on age and disability. See Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2000); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2000).

Additionally, some states include sexual orientation as a protected class. See California Fair Employment and Housing Act (FEHA), CAL. GEN. CODE §§ 12900–12996.

¹¹¹ See *Frequently Asked Questions*, *supra* note 6.

¹¹² *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008).

¹¹³ *Id.* at 794.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 795–96.

¹¹⁷ *Raess v. Doescher*, 858 N.E.2d 119, 122 (Ind. Ct. App. 2006), *jury verdict reinstated*, 883 N.E.2d 790 (2008).

¹¹⁸ *Id.* at 123–24.

On appeal to the Indiana Supreme Court, the jury award for assault was reinstated. The court found the testimony of the expert was entirely appropriate and that the term “workplace bullying” was appropriate to use as a term to characterize a person’s behavior.¹¹⁹ The court went on to hold that workplace bullying could be seen as a form of IIED and that the trial court did not err in refusing to instruct the jury that workplace bullying is not illegal.¹²⁰ Although this case did not create a new legal claim in the state of Indiana, the decision has received national attention because the media has characterized the case as a successful workplace bullying claim.¹²¹ Some anti-bullying advocates believe that this decision will help lead to the passage of anti-bullying legislation,¹²² while other commentators find the Raess decision to be less significant.¹²³

The bottom line is that workplace bullying is not adequately remedied by current law. Given the near impossibility of making out a tort claim against bullies and the fact that only 20% of workplace bullying claims implicate discrimination statutes, victims of workplace bullying are without a sufficient remedy in 80% of all bullying-related incidents.¹²⁴ There is no legislation prohibiting the majority of the conduct so employers have little reason to take the problem seriously.¹²⁵

IV. THE HEALTHY WORKPLACE BILL AND ITS VARIATIONS AROUND THE COUNTRY

Due to the seriousness and pervasiveness of workplace bullying and the lack of existing legal protections for targets of workplace bullying, there has been a wave of support for legislation that will address this issue and provide a remedy for those affected by workplace bullying. David C. Yamada, the predominant scholar in the area of workplace bullying, has developed a model statute that addresses the issue of workplace bullying while attempting to minimize the impact on small business: The Healthy

¹¹⁹ Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008).

¹²⁰ *Id.*

¹²¹ David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251 (2010) (citing Karen E. Klein, *Employers Can’t Ignore Workplace Bullies*, BUSINESSWEEK (May 7, 2008), http://www.businessweek.com/smallbiz/content/may2008/sb2008057_530667.htm (reporting that the decision “drew national attention as acknowledgment by the courts of workplace bullying both as a phenomenon and as legal terminology”)) [hereinafter *Workplace Bullying*].

¹²² Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick to Quash Common Law Remedies?*, 65 BENCH & B. MINN., Nov. 2008, at 23.

¹²³ Jordan F. Kaplan, *Help Is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 169 (2010).

¹²⁴ DANIEL, *supra* note 12, at 30.

¹²⁵ *Id.*

Workplace Bill ("the Bill").¹²⁶ The Bill creates a baseline cause of action for severe cases of workplace bullying,¹²⁷ while promoting the primary policy objectives of prevention and compensation and discouraging frivolous and marginal claims.¹²⁸

A. *Central Provisions of the Healthy Workplace Bill*

The Healthy Workplace Bill states the cause of action: "It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter."¹²⁹ The Bill defines an abusive work environment as existing when the defendant, acting with malice, subjects the employee to abusive conduct so severe that it causes tangible harm to the employee.¹³⁰ The most significant definition is that of *abusive conduct*:

Conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interest. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard. Conduct is defined to include all forms of behavior, including acts and omissions of acts.¹³¹

According to Healthy Workplace Bill author Yamada, the Bill uses a reasonable person standard instead of the extreme and outrageous standard or the "beyond the bounds of reasonable society" standard in order to give a clear sign to courts that this bill is not a statutory adoption of IIED jurisprudence.¹³² The definition of abusive conduct, however, provides an important check on the scope of the cause of action. Although the standard is not as high as the standard in an IIED claim, the standard is still high enough to prevent frivolous litigation and unreasonable demands on employers.

¹²⁶ *Crafting a Legislative Response*, *supra* note 55, at 475.

¹²⁷ *Id.* at 498.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 498-99.

¹³² *Crafting a Legislative Response*, *supra* note 55, at 499.

Yamada refers to protections within the Bill as “status-blind hostile work environment protection.”¹³³ If the workplace is sufficiently abusive, then protections should not save an employer from liability just because the abuse is inflicted without regard to race, sex or national origin.¹³⁴ It is harmful to a person to be bullied at work, even if that bullying is not based on membership in a protected class. He argues that the law should provide a baseline for minimal dignity in the workplace, while additional protections can exist for those bullied because of their race, sex or national origin.¹³⁵

The Healthy Workplace Bill reflects a conscious decision to provide a cause of action for severe bullying, thereby sacrificing claims for comparatively moderate offending behaviors, which will act to prevent or discourage weak and frivolous litigation.¹³⁶ Other necessary limits on the cause of action that will protect against frivolous lawsuits include the requirements of tangible harm¹³⁷ and malice.¹³⁸

Additionally, employers are held vicariously liable for any unlawful employment practices committed by its employees.¹³⁹ Because employers are held vicariously liable, the Bill sets out affirmative defenses for employers.¹⁴⁰ The Bill provides that it will be an affirmative defense for an employer only if: (1) The employer exercised reasonable care to prevent and promptly correct any actionable behavior; and, (2) The complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.¹⁴¹ This defense not

¹³³ *The Phenomenon of “Workplace Bullying”, supra* note 26, at 523.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Crafting a Legislative Response, supra* note 55, at 499.

¹³⁷ *Id.* at 500. Tangible harm can be either psychological harm or physical harm. *Id.* Psychological harm is “the material impairment of a person’s mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.” *Id.* Physical harm is “the material impairment of a person’s physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.” *Id.*

¹³⁸ *Id.* at 501. Malice is defined as “the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. *Id.* Malice can be inferred from the presence of factors like outward expressions of hostility, harmful conduct inconsistent with an employer’s legitimate business interests, a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional or physical distress in the face of the conduct or attempts to exploit the complainant’s known psychological or physical vulnerability.” *Id.*

¹³⁹ *Id.* (“An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.”).

¹⁴⁰ *Id.* at 506. The bill provides two other affirmative defenses: “It shall be an affirmative defense that: (1) The complaint is grounded primarily upon a negative employment decision made consistent with an employer’s legitimate business interests, such as a termination or demotion based on an employee’s poor performance; or, (2) The complaint is grounded primarily upon a defendant’s reasonable investigation about potentially illegal or unethical activity.” *Id.*

¹⁴¹ *Id.* at 501–02.

only limits the circumstances in which an employer will be held liable, it also encourages employers to take preventive and responsive measures for workplace bullying.¹⁴² The two-step framework of this affirmative defense is drawn from the United States Supreme Court's explanation of the sexual harassment affirmative defense¹⁴³ in *Burlington Industries, Inc. v. Ellerth*¹⁴⁴ and *Faragher v. City of Boca Raton*.¹⁴⁵ Similar to a sexual harassment affirmative defense, the workplace bullying affirmative defense is intended to encourage employers to correct any abusive behavior that may be present in their workplace.¹⁴⁶ This affirmative defense is not available to employers when the actionable behavior has resulted in a negative employment decision.¹⁴⁷

Damages under the Healthy Workplace Bill include injunctive relief, compensatory damages, and a cap on damages. According to the Bill, a court may enjoin a defendant from engaging in the alleged unlawful employment practices.¹⁴⁸ The court may also reinstate the targeted employee, remove the bully from the complainant's work environment¹⁴⁹ or require the employer to compensate for back pay, front pay, medical expenses, emotional distress, punitive damages and attorney's fees.¹⁵⁰ A significant limit on remedies is that if the unlawful employment practice did not result in a negative employment decision, then the liability for emotional distress will be capped at \$25,000 and punitive damages will not

¹⁴² *The Phenomenon of "Workplace Bullying"*, *supra* note 55, at 503.

¹⁴³ *Id.*

¹⁴⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

¹⁴⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that an "employer was subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate authority over the employee"). The court also set out the following two-part test: (1) The employer must establish that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) The employer must establish that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

¹⁴⁶ *The Phenomenon of "Workplace Bullying"*, *supra* note 55, at 503.

¹⁴⁷ *Id.* at 502.

¹⁴⁸ *Id.* at 504.

¹⁴⁹ *Id.* This potential remedy is significant and could be contentious, and was included by Mr. Yamada out of a sense of fairness to the bullied employee who should not have to change jobs, departments, or offices in order to avoid working with the bully. *Id.*

¹⁵⁰ *Id.*

Whether a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorney's fees.

Id.

be allowed.¹⁵¹ Finally, a target of bullying can elect to accept workers' compensation benefits instead of bringing an action under this statute.¹⁵² These remedies and their limits provide a balanced approach to solving the workplace bullying problem.

B. Bills Currently in State Legislatures around the Country

Various forms of the Healthy Workplace Bill have been introduced in state legislatures around the country. As of March 28, 2012, eighteen bills were active in thirteen different states.¹⁵³ Almost all of these bills are expected to be dead-on-arrival in the various legislatures. States with active legislation include Washington,¹⁵⁴ Nevada,¹⁵⁵ Utah,¹⁵⁶ Minnesota,¹⁵⁷ Illinois,¹⁵⁸ West Virginia,¹⁵⁹ Maryland,¹⁶⁰ New Jersey,¹⁶¹ Vermont,¹⁶² Massachusetts¹⁶³ and New York.¹⁶⁴

¹⁵¹ *Id.*

¹⁵² *Crafting a Legislative Response*, *supra* note 55, at 506–07.

A person who elects to accept workers' compensation may not bring an action under this Chapter for the same underlying behavior. This provision grants a bullying target a right of choice, while precluding the possibility of unjust enrichment by prohibiting obtaining relief through both the anti-bullying statute and workers' compensation.

Id.

¹⁵³ 21 States Since 2003 Have Introduced the HWB, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states.php> (last visited Mar. 30, 2012).

¹⁵⁴ Washington State—Legislation Status & News, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/wa/washington.php> (last visited Mar. 30, 2012) (current bill is effectively dead).

¹⁵⁵ Nevada—Legislation Status & News, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/nv/nevada.php> (last visited Mar. 30, 2012). In Nevada, there has been no movement on the current bill since April 16, 2011; it is seemingly dead in the Assembly Commerce and Labor Committee. *Id.*

¹⁵⁶ Utah—Legislation Status & News, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/ut/utah.php> (last visited Mar. 30, 2012). In Utah, SB292 has struggled to make it out of the House Business and Labor Committee. *Id.*

¹⁵⁷ HF1701 Status in House for Legislative Session 87, MINN. ST. LEGIS., https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF1701&ssn=0&y=2011 (last visited Mar. 30, 2012) (HF 1701 stuck in committee).

¹⁵⁸ Illinois—Current Status & News, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/il/illinois.php> (last visited Mar. 30, 2012) [hereinafter *Illinois*]. The Illinois Legislature, which previously passed a version of the bill through the state Senate but was unsuccessful in holding a vote on the House floor, has a new version of the Bill, HB 942, which is currently “parked in the Rules Committee.” *Id.*

¹⁵⁹ Bill Status—Complete Bill History, W. VA. LEGIS., http://www.legis.state.wv.us/bill_status/bills_history.cfm?year=2011&sessiontype=RS (last visited Mar. 30, 2012) (West Virginia version stuck in the House Energy, Industry and Labor, Economic Development and Small Business Committee).

The only proposals that have made some progress are those bills in Illinois, Massachusetts and New York. The Illinois version of the Healthy Workplace Bill, SB 3566, passed the Illinois Senate by a vote of 35–17 on March 18, 2010.¹⁶⁵ This bill was then submitted to the Illinois House, but never came to a vote in the Illinois House Labor Committee.¹⁶⁶ Although this bill was never signed into law, the Illinois House had previously passed House Joint Resolution 40, which created the Illinois Task Force on Workplace Bullying to study workplace bullying and its impact in the private sector.¹⁶⁷ Through these actions, the Illinois Legislature has shown its willingness to confront the issue of workplace bullying.

Another state to show a willingness to discuss this issue is Massachusetts. The Massachusetts version of the Healthy Workplace Bill was referred to the Joint Committee on Labor and Workforce Development. Unlike other state legislatures, a public hearing was held on HB 2310 on July 14, 2011.¹⁶⁸ Massachusetts is one of only two states to hold public hearings on a version of the Healthy Workplace Bill.¹⁶⁹

The state that has made the most progress in the fight to pass workplace bullying legislation is New York. On May 12, 2010, the New York State Senate passed the Healthy Workplace Bill by a vote of 45–16.¹⁷⁰ This bill

¹⁶⁰ *Bill Info—2011 Regular Session—SB 600*, MD. GEN. ASSEMB., <http://mlis.state.md.us/2011rs/billfile/SB0600.htm> (last visited Mar. 30, 2012). In Maryland, a public hearing was held in front of the Senate Finance Committee, but no action has been taken on SB 600 since March 3, 2011. *Id.*

¹⁶¹ *New Jersey—Current Legislation Status & News*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/nj/newjersey.php> (last visited Mar. 30, 2012) (bill referred to the Senate Labor Committee).

¹⁶² *The Vermont Legislative Bill Tracking System*, VT. STATE LEG., <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0052&Session=2012> (last visited Mar. 30, 2012). Vermont, while attempting to pass a version of the Healthy Workplace Bill, passed S 52 which changed the original text of the bill to set up a new committee to study the issue of workplace bullying. *Vermont—Legislation Status & News*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/vt/vermont.php> (last visited Mar. 30, 2012).

¹⁶³ *Massachusetts—2011–2012 Legislative Activity*, HEALTHY WORKPLACE B., <http://www.healthyworkplacebill.org/states/ma/massachusetts.php> (last visited Mar. 30, 2012) [hereinafter *Massachusetts*]. In Massachusetts, HB 2310 was referred to the Joint Committee on Labor and Workforce Development and a public hearing was held on July 14, 2011. *Id.*

¹⁶⁴ *See New York*, *supra* note 7. In New York, Senate Bill S 4289 has been referred to the Labor Committee and the Assembly Bill A 4258 was introduced on February 2, 2011. *Id.*

¹⁶⁵ *See Illinois*, *supra* note 158.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Massachusetts*, *supra* note 163.

¹⁶⁹ The other state was Maryland, as of January 1, 2012. *See Crafting a Legislative Response*, *supra* note 55.

¹⁷⁰ *Workplace Bullying*, *supra* note 121, at 252.

stalled in the New York Assembly Labor Committee and failed to get an up or down vote on the Assembly floor.¹⁷¹ A new version of the Healthy Workplace Bill, A 2458, was introduced in the New York Assembly on February 2, 2011.¹⁷² A companion bill, S 4289, was introduced in the Senate and referred to the Labor Committee on March 28, 2011.¹⁷³ The Senate bill currently has seventeen sponsors and the Assembly bill has seventy-five sponsors.¹⁷⁴

The language of the two current bills in the New York Legislature tracks the language of the Healthy Workplace Bill. The New York bills include the same cause of action, the same affirmative defenses and the same legislative findings.¹⁷⁵ The legislative findings and intent are particularly interesting. The findings claim that the “social and economic well-being of the state is dependent upon healthy and productive employees” and explains that current law is inadequate to deal with the issue.¹⁷⁶ The progress of the Healthy Workplace Bill in the New York Legislature is important to the movement for workplace bullying legislation throughout the country. Although New York is only one state, it is considered a bellwether state, and proponents, including Dr. Gary Namie, believe that other states will follow with similar legislation if it has success in New York.¹⁷⁷ Furthermore, New York is one of the biggest states in the country and has arguably the most important job market in the United States—New York City. Passage of the Healthy Workplace Bill in New York would have a significant impact on the workplace bullying movement.

C. *Similar protections against workplace bullying around the world*

Many other industrialized countries have adopted legislative and judicial protections against workplace bullying or are considering doing so. These countries include Germany,¹⁷⁸ France,¹⁷⁹ Sweden,¹⁸⁰ Belgium,¹⁸¹ the

¹⁷¹ *New York*, *supra* note 7.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 2012 Legislative Summary, N.Y. HEALTHY WORKPLACE ADVOCATES, <http://www.nyhwa.org/index.html> (last visited Mar. 30, 2012).

¹⁷⁵ NYSENATE.GOV, *supra* note 24.

¹⁷⁶ *Id.*

¹⁷⁷ Susman, *supra* note 10.

¹⁷⁸ Kaplan, *supra* note 123, at 151 (citing Gabrielle S. Friedman, *Dignity at Work: Harassment Law in Germany and the United States*, 8 EMP. RTS. & EMP. POL’Y J. 154, 157–59 (2004)). Anti-bullying protections in Germany developed through judicial interpretation of existing statutes, instead of through specific statutes designed to curb workplace bullying. *Id.* Courts combined the constitutional principles of valuing human dignity and free will with the statutory duties imposed on employers to protect their employees’ right of free will. *Id.*

¹⁷⁹ *Id.* at 151. France passed anti-bullying laws in the form of the Modernization of Employment Act in 2002, which defines moral harassment, requires employers to fulfill certain obligations and provides for fines and prison time for violations. *Id.*

United Kingdom¹⁸² and others.¹⁸³ Progress of workplace bullying protections in the United Kingdom may be indicative of the future of workplace bullying protections in the United States. In the 1990s, the courts in the United Kingdom recognized harassment as a tort.¹⁸⁴ In response to this, and to a number of harassment acquittals, Parliament passed a national harassment law in 1996.¹⁸⁵ Although this legislation does not specifically mention workplace bullying, it has been used as a protection against workplace bullying and those who employ workplace bullies.¹⁸⁶ The United Kingdom has attempted to pass legislation specifically outlawing workplace bullying, but these attempts were unsuccessful due to the fact that legislators believed current law was sufficient to combat the problem.¹⁸⁷

V. WHAT THE HEALTHY WORKPLACE BILL WILL MEAN FOR SMALL BUSINESSES

The Healthy Workplace Bill and its variations within state legislatures around the country do not include an exemption for small businesses, unlike past legislation regulating the workplace.¹⁸⁸ The lack of an exemption is necessary because research has shown workplace bullying is just as prevalent in small businesses as it is in big businesses.¹⁸⁹ In a survey done by Wayne Hochwarter of the Florida State University College of Business, "one-third of respondents said they work for companies with about 100 employees or less, and of those, 23.5% reported experiencing supervisor bullying on a weekly basis, compared with 21.3% of the other two-thirds of respondents who said they work for larger corporations."¹⁹⁰ Anti-bullying legislation that exempted small businesses would ignore a significant segment of the population that is experiencing workplace bullying.

¹⁸⁰ Kaplan, *supra* note 123 (citing M. Neil Browne & Mary Allison Smith, *Mobbing in the Workplace: The Latest Illustration of Pervasive Individualism in American Law*, 12 EMP. RTS. & EMP. POL'Y J. 131, 134-35 (2008)) (Swedish anti-bullying legislation is similar to the legislation in France).

¹⁸¹ *Id.* Belgium passed its law in 2002, which requires employers to put certain measures in place to prevent different types of harassment. *Id.*

¹⁸² *Id.*

¹⁸³ Kaplan, *supra* note 123, at 151-52 (stating workplace bullying protections have also been enacted in Poland, Canada, Argentina and Australia).

¹⁸⁴ *Id.* at 153.

¹⁸⁵ *Id.*

¹⁸⁶ See *Majrowski v. Guy's & St. Thomas's NHS Trust*, [2006] UKHL 34, [2007] 1 A.C. 224, 226 (H.L.); *Green v. DB Group Servs. (UK) Ltd.*, [2006] EWHC (QB) 1898.

¹⁸⁷ Kaplan, *supra* note 123, at 154.

¹⁸⁸ See, e.g., Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2006); Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (2006).

¹⁸⁹ Sarah E. Needleman, *For Businesses, Bully Lawsuits May Pose New Threat*, WALL ST. J. (May 26, 2010), <http://online.wsj.com/article/SB10001424052748704717004575268701579722946.html>.

¹⁹⁰ *Id.*

A. The Case in opposition to the Healthy Workplace Bill

A significant segment of the business community remains opposed to this type of legislation, despite the costs associated with workplace bullying. Among their concerns are the creation of an additional exception to the default rule of employment at-will, the intrusion into private ordering and the potential for frivolous litigation.¹⁹¹ The U.S. Chamber of Commerce has argued that employers do not need more regulation and that the bill is too subjective, will be too costly and will kill new job activity.¹⁹² Opponents also argue that there are already laws at the federal level, and in many states, that protect against sexual harassment and discrimination.¹⁹³ Groups like the U.S. Chamber of Commerce suggest that the economic incentives will be enough to incentivize companies to take steps to prevent workplace bullying.¹⁹⁴

Opponents of this legislation insist that the new cause of action will mean the end of the at-will employment system.¹⁹⁵ At-will employment is essentially the right to fire employees for good cause, bad cause or no cause at all.¹⁹⁶ In an op-ed piece in the New York Daily News, two opponents of the New York version of the Healthy Workplace Bill say that the new law would allow any worker that has been fired in New York to file a lawsuit, assuming he or she could allege plausible abusive practices.¹⁹⁷ As is evident from the extensive discussion about the various provisions of the Healthy Workplace Bill,¹⁹⁸ this is not the only requirement of a cause of action and is a mischaracterization of the law. The cause of action is much more complex and requires that employees have substantial evidence in order to be successful.¹⁹⁹

Free market theorists think that the market will sort out the issue of workplace bullying because bad employers will suffer reputational losses, and good employees who experience arbitrary or poor treatment, or witness the same inflicted on their coworkers, will look elsewhere for

¹⁹¹ Scott H. Greenfield, *Bad Bosses Meet Teacups (Update)*, SIMPLE JUST. (May 29, 2010, 5:16 AM), <http://blog.simplejustice.us/2010/05/29/bad-bosses-meet-teacups.aspx>.

¹⁹² DANIEL, *supra* note 12, at 64.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ E.J. McMahon & James Copland, *New York's Latest Job Killer: A New Bill Would Give Workers Broad Rights to File Suit When Fired*, NYDAILYNEWS.COM (May 18, 2010), <http://www.nydailynews.com/opinion/york-latest-job-killer-a-bill-give-workers-broad-rights-file-suit-fired-article-1.446041>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See discussion *supra* Part IV.

¹⁹⁹ *Crafting a Legislative Response*, *supra* note 55, at 500.

employment.²⁰⁰ What these opponents overlook, however, is the lack of ability to move freely between jobs, especially during an economic downturn. Recent numbers released by the Bureau of Labor Statistics indicate an unemployment rate of 9%.²⁰¹ Moreover, the nationwide unemployment rate has been near or above 9% since March of 2011.²⁰² This type of long-term high unemployment makes it very hard to move between jobs. Opponents argue that if employees can find a new job in a week and a half, then they do not have to put up with a bad boss or coworker.²⁰³ Although this may be true, that hypothetical is far from reality. Jobs are few and far between right now, and unemployment is anticipated to remain at higher than normal levels for the foreseeable future.²⁰⁴

Some opponents believe that hiring and firing decisions should be left entirely to the discretion of the manager, and that this type of legislation will infringe on management's ability to do either.²⁰⁵ As the author of the Healthy Workplace Bill notes, there are legitimate concerns that this type of law could overreach and serve as a legal micro-manager of the workplace.²⁰⁶ But the author of the Healthy Workplace Bill responds that these concerns are exactly why he constructed the Bill—as a balance of the legitimate interests of workers and their employers—and established a high threshold for recovery.²⁰⁷

B. *The Case for the Healthy Workplace Bill*

Proponents of this legislation cite multiple reasons why the Healthy Workplace Bill and its variations are not bad for business. Among these reasons are the high standard for proving a case, the damage cap on certain

²⁰⁰ *The Phenomenon of "Workplace Bullying"*, *supra* note 26, at 532. (citing Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 968 (1984)).

²⁰¹ *Employment Situation Summary*, BUR. LAB. STAT. (Nov. 4, 2011), available at <http://www.bls.gov/news.release/empsit.nr0.htm>.

²⁰² *Bureau of Labor Statistics Data*, BUR. LAB. STAT., available at <http://data.bls.gov/timeseries/LNS14000000> (last visited Mar. 30, 2012).

²⁰³ Suzanne Lucas, *Why Workplace Bullying Should be Legal*, CBS NEWS (Mar. 23, 2011), http://www.cbsnews.com/8301-505125_162-44941976/why-workplace-bullying-should-be-legal/?tag=bnetdomain.

²⁰⁴ See Alana Semuels, *Unemployment Rate Falls but U.S. Economy Remains Sluggish*, L.A. TIMES (Nov. 5, 2011), <http://articles.latimes.com/2011/nov/05/business/la-fi-1105-jobs-20111105> (discussing concerns of sluggish growth and growth only in low-compensation jobs).

²⁰⁵ Lucas, *supra* note 203.

²⁰⁶ David Yamada, *Opposing Workplace Bullying Legislation: Are Depression, PTSD, and Suicide an "Emily Post Problem"?*, MINDING THE WORKPLACE (July 17, 2010), <http://newworkplace.wordpress.com/2010/07/17/opposing-workplace-bullying-legislation-are-depression-ptsd-and-suicide-an-emily-post-problem/>.

²⁰⁷ *Id.*

types of claims, the balance of employer and employee interests and the incentives provided by provisions of the Bill.²⁰⁸

First, the standard to prove a case under the Healthy Workplace Bill is high. The Bill requires that actual physical or psychological harm be present and be caused by the workplace bullying.²⁰⁹ This can be proven by testimony from a competent physician or by an expert witness.²¹⁰ This will avoid frivolous litigation because it will discourage a plaintiff from bringing claims in which he or she does not have this type of evidence. Additionally, there is a \$25,000 cap on claims of bullying that do not result in a negative employment action.²¹¹ Only in cases where the employment practice did result in a negative employment decision will the defendant be liable for compensatory and punitive damages above \$25,000.²¹²

Affirmative defenses provide a further check on this legislation. Such a defense may be used if a complaint is primarily grounded upon a negative employment decision made consistent with an employer's legitimate business interest, such as termination or demotion based on an employee's poor performance.²¹³ This defense allows defendant to resist claims of workplace bullying that are the result of their legitimate business interests. It is also a defense if "the complaint is grounded primarily upon a defendant's reasonable investigation about potentially illegal or unethical activity."²¹⁴

This Bill also has components that encourage employers to correct workplace bullying. This Bill provides an affirmative defense if the employer begins to address the bullying problem. If the employer takes steps to address the issue, then there can be no claim under the law. These affirmative defenses are necessary to prevent frivolous and costly litigation as a result of this new cause of action.

VI. CONCLUSION

Given the high costs that are associated with bullying in the workplace, the high bar set by the statute to have a successful claim, the affirmative defenses provided in the legislation and the cap on the amount of damages in certain situations, it is better for business that there is a cause of action against workplace bullying. Additionally, workplace bullying is pervasive in our society, and current legal remedies do not provide sufficient relief for

²⁰⁸ David Yamada, *Why the Healthy Workplace Bill Is Not a "Job Killer"*, MINDING THE WORKPLACE (May 26, 2010), <http://newworkplace.wordpress.com/2010/05/26/why-the-healthy-workplace-bill-is-not-a-job-killer/>.

²⁰⁹ See discussion *supra* Part IV.A.

²¹⁰ *Crafting a Legislative Response*, *supra* note 55, at 500.

²¹¹ *Id.* at 504.

²¹² *Id.*

²¹³ *Id.* at 506.

²¹⁴ *Id.*

those who fall victim to bullying. If there are statutes providing a cause of action against workplace bullies, then companies will be more aware of the bullying and the statutes will have a deterring effect. Even if successful claims are not often brought under the new cause of action, the deterrence factor in the potential liability may be enough to correct the pervasive issue of bullying in the American workplace.